No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

STEPHEN RICHARDS, in his official capacity as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1) When a State taxes the receipt of fuel by distributors, manufacturers and importers, and such receipt occurs off-reservation, does the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), apply because the fuel is later sold by a tribe to final consumers?

2) Should the Court replace the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent?

3) Did the court of appeals err in applying the *White Mountain Apache* interest balancing test by, *inter alia*, placing dispositive weight on the fact that a tribally-owned gas station derives income from largely non-tribal patrons of Respondent's nearby casino?

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OPINIONS BELOW

The August 11, 2004, decision of the United States Court of Appeals for the Tenth Circuit is reported at 379 F.3d 979 (10th Cir. 2004), and is included in the Joint Appendix. The prior decisions of the District Court are reported at 241 F. Supp. 2d 1295 (D. Kan. 2003), and 2003 WL 21536881 (D. Kan. 2003). These decisions are included in the Joint Appendix (hereinafter "J. A.").

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The court of appeals issued its decision in this case on August 11, 2004. The Petitioner petitioned for a writ of *certiorari* on November 5, 2004, which was granted on February 28, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Indian Commerce Clause of Article I provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. U.S. Const. Art. I, § 8, cl. 3.

STATUTORY PROVISIONS INVOLVED

Kan. Stat. Ann. § 79-3402 (1997) provides that

> The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever.

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) provides that

> A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) provides that

> Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein . . . .

Kan. Stat. Ann. § 79-34,141(b)(1) and (2) (Supp. 2003) provides that

> On and after July 1, 2003, until July 1, 2020, the tax imposed under this act shall be not less than: (1) on motor-vehicle fuels, $.24 per gallon, or fraction thereof; (2) on special fuels, $.26 per gallon, or fraction thereof[.]

STATEMENT OF THE CASE

A. Material Facts.

Kansas imposes a tax of 24 cents per gallon on gasoline and 26 cents per gallon on diesel fuel Kan. Stat. Ann. § 79-34,141(b)(1)(2) (Supp. 2003). The tax is imposed on the receipt of motor fuel by a distributor, importer or manufacturer. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). Gasoline and diesel fuel, in a finished, ready to sell condition, are imported from outside Respondent's reservation for re-sale at its gas station. J. A. 91, 114. Davies Oil (distributor here), located in Troy, Kansas (off-reservation, approximately 60 miles from Respondent's gas station), receives gasoline and diesel off-reservation and resells it to Respondent. J. A. 5, 19, 91, 112, 119. The State provides services to the taxpayer (the fuel distributor), Respondent and Respondent's customers, including but not limited to a state-wide road, bridge and highway infrastructure, chief among which is a four-lane highway crossing Respondent's reservation and leading to its casino and gasoline station from population centers in Kansas. J. A. 114-15, 118.

Respondent sells gasoline at its station largely to non-Indians, many of whom may have patronized its casino. J. A. 88, 91. Most of the non-Indian purchasers of the

gasoline drive largely off-reservation. J. A. 114-15, 118. Respondent imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. J. A. 91. Respondent uses the revenue from its tax to maintain some of the roads on its reservation, including the one-and-one-half miles of road from the state maintained highway at its reservation boundary to its casino. J. A. 42, 79, 91-2.

B. Proceedings Below.

Respondent filed suit in federal district court seeking to enjoin the State from imposing its motor fuel tax on fuel received off-reservation by Respondent's fuel suppliers. J. A. 90. The district court granted the Petitioner's Motion for Summary Judgment and denied Respondent's request for reconsideration. J. A. 90, 123. In making these rulings, the district court held that the State has a fundamental, sovereign interest in its system of taxation. J. A. 119. The district court determined that the legal incidence of the State tax at issue falls on the distributor, and not the Respondent. J. A. 119. The district court held that because the State exercised its tax jurisdiction off-reservation, the State's interests were at their strongest and exceeded the economic interests of Respondent, which were, comparatively, at their weakest. J. A. 114-15. Finally, the district court rejected Respondent's argument that selling finished gasoline near the Respondent's casino generated value on the reservation sufficient to supersede the State's sovereign interest in its system of off-reservation taxation. J. A. 114.

The court of appeals, reviewing the district court's decision *de novo*, reversed the district court. J. A. 131. The court of appeals concluded that precedent of the circuit precluded it from addressing the State's request to abandon

the balance-of-interests test. J. A. 137, and concluded that the balance-of-interests test is appropriate to analyze, and ultimately strike, the State tax imposed off-reservation. J. A. 137. The court of appeals acknowledged that the State's tax was imposed off-reservation against a non-tribal member but nevertheless concluded that the Kansas tax, as applied, is preempted by implication as incompatible with and outweighed by the strong tribal and federal interests against the tax. The tribal and federal interests noted by the court were the generalized interest in economic viability of Respondent. J. A. 142-43.

The court of appeals relied principally upon the fact that approximately three-quarters of Respondent's gas station customers were either casino patrons or employees, and that the station's revenues therefore were derived from "value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." J. A. 143 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)). The court of appeals distinguished this Court's decision in *Colville* because Respondent maintains a one-and-a-half mile access road from State Highway 75 to Respondent's gas station, J. A. 143, and because Respondent was then selling its gasoline within two cents of the prevailing local market rate. J. A. 139-40.

SUMMARY OF ARGUMENT

I. In the long, sometimes tumultuous history of federal, state and tribal relations, few absolutes have been established. One absolute that has emerged, however, is that when a state administers and enforces its non-discriminatory laws off-reservation, and Congress has not

expressly preempted those non-discriminatory state laws, state sovereignty supersedes tribal interests.

This Court has only applied the *White Mountain Apache* balance-of-interests test in state-tribal matters when a State endeavors to exert its authority on-reservation. There is no precedent from this Court that imposes the balance-of-interests test against a non-discriminatory state law imposed and administered off-reservation. Indeed, precedent from this Court has clearly held that States are free to apply their non-discriminatory laws off-reservation, even against Indians. In so holding, this Court has held that a tribe's or its members' general exemption from state regulation ends at the reservation border. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). ("[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component'"). Hence, decisions from this Court holding that States are free to apply their non-discriminatory laws off-reservation rely on traditional preemption standards (express congressional preemption, or where Congress has so occupied a given field that there is no room for state jurisdiction), and do not utilize a balancing analysis. "Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

Kansas' system of fuel taxation is designed to pay for building and maintaining its roads, highways and bridges. Kan. Stat. Ann. § 79-3402 (1997). The Kansas legislature has imposed the legal incidence of its fuel tax on the first receipt of fuel by distributors, manufacturers or importers. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). Under the facts of this case, the state fuel tax attached when the fuel was

first received by the distributor, which is off-reservation in Troy, Kansas. J. A. 5, 19, 91, 112, 119.

The court of appeals' decision below has improperly created a "halo effect" of tribal immunity beyond reservation borders to strike the State's interest in its off-reservation system of taxation. The court of appeals held that the State's application of non-discriminatory off-reservation laws was subject to balancing because the state law might subsequently touch upon on-reservation tribal activity. In practical effect, the court extended "Indian country" beyond Respondent's reservation borders into all four corners of the State of Kansas by rationalizing that otherwise lawful off-reservation state regulation might subsequently result in an economic cost to the Respondent. It is further disconcerting that there are no practical, limiting parameters in the court of appeals' rationale or holding.

Logically extended, the court of appeals' analysis means that a tribe's interests reach beyond not only its reservation boundaries, but beyond the boundaries of Kansas into other states, and can be used to strike any state tax anywhere, provided the tribe can show that the state tax may appear as a cost for products or services that subsequently end up on the tribe's reservation. Equally disturbing, the court of appeals has imbued a private corporation, the distributor receiving the fuel off-reservation, with Respondent's general, on-reservation immunity from state regulation – a wholly unprecedented and anomalous result.

II. The balance-of-interests test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), has proved unworkable. Tax administration requires

predictability. The balance-of-interests test provides none. Here, Kansas administers its system of fuel taxation in full compliance with *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), only to have the court of appeals strike it down. Even though the state tax was imposed off-reservation (upstream, away from Respondent – in compliance with *Chickasaw Nation*), the state system of taxation was still preempted by the court of appeals because the economic effect of the cost of the state tax could be passed through to Respondent.

While this Court adheres to *stare decisis* as an ordinary matter, it has not hesitated to abandon precedent that has shown itself ill-fitted to coherent, reasonably predictable decision-making. Kansas believes that such a time has arrived in regard to the balance-of-interests test. As predicted by then-Justice Rehnquist, when dissenting in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 176-186 (1980), the test is inimical to predictable tax administration. The balance-of-interests test should be replaced with a standard analogous to that applicable to federal contractors – *i.e.* States may tax non-tribal members, even if the tax may have an economic effect on a tribe, unless Congress has expressly provided otherwise.

III. The court of appeals' decision stretches the concept of "reservation added value" discussed in *Colville* far beyond its intended scope. In determining that the "value" generated by Respondent was sufficient to oust the off-reservation state tax, the court relied almost exclusively on the fact that the tribe built its gas station near its casino and constructed a one-and-a-half mile access road from the gas station to State Highway 75. The court

of appeals determined that the lone state interest was mere revenue raising.

The court of appeals erred by failing to consider that Kansas has built and maintains a major, four-lane highway that cuts through Respondent's reservation. J. A. 36, 39, 67, 79, 114-15, 118. Other state governmental units have built and maintain numerous other miles of roads and bridges both on and near the reservation. J. A. 79. Additionally, Kansas provides substantial services to the taxpayer (here, the distributor) which must use state roads to transport fuel to Respondent's gas station. J. A. 5, 19, 91, 112, 119. Under these circumstances, this Court's decision in *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989), controls. Aside from providing these services, which are no less critical to the casino than a short connector road, the State has not infringed on tribal sovereignty by direct on-reservation regulation or taxation. In the face of this compelling showing of state interests and the absence of any intrusion by Kansas into internal reservation affairs through the challenged tax, the court of appeals plainly lost its way in concluding that, even if applicable, *White Mountain Apache* required that the Kansas motor fuel tax be invalidated.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH CONTROLLING PRECEDENT FROM THIS COURT WITH RESPECT TO APPLICABILITY OF THE *WHITE MOUNTAIN APACHE* BALANCING TEST.

Under the correct legal standard, the Kansas motor fuel tax is not preempted or otherwise invalid, because it

is imposed on the off-reservation receipt of motor fuel by the distributor. The court of appeals erred when it decided this case using the *White Mountain Apache* balance-of-interests test to invalidate the State's motor fuel tax. State taxes imposed and administered off-reservation are subject to review under an altogether different standard (express federal preemption) than state taxes imposed and administered on-reservation (special Indian law preemption based on balance-of-interests). By striking a state system of taxation imposed and administered off-reservation, the court of appeals erred in failing to recognize and uphold the significant and fundamental state sovereignty interests that lie at the heart of our system of federalism.

A. State Interests

The beginning point for analysis in this case is recognition that a State has the sovereign authority to enact and administer non-discriminatory systems of taxation within its jurisdiction. A State's system of taxation is a significant and compelling sovereign interest in our system of federalism. This inherent right was recognized as part and parcel of the accommodation of national and state interests embodied in the Constitution. *The Federalist No. 32* (Alexander Hamilton) ("I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution"); *see also id. No. 45* (Alexander Hamilton) (state authority "extend[s] to all the objects which, in

the ordinary course of affairs, concern the lives, liberties, and properties of people, and the internal order, improvement, and prosperity of the State").

A State's sovereign power to tax its citizens has been a hallmark of western legal tradition. This historical fact was clearly in the Framers' minds when they considered the intertwining doctrines of sovereign immunity and a state power to tax its citizens. State sovereignty to tax as expressed by Alexander Hamilton over two centuries ago has, with limited and express exceptions, withstood challenge. Congress has heeded the Framers' intention by leaving no doubt that a state has a special and fundamental interest in its tax collection system. *E.g.*, Act of Aug. 21, 1937 (Tax Injunction Act), Pub. L. No. 332, 50 Stat. 738, ch. 726, § 1, (1937) (codified at 28 U.S.C. § 1341). *See also* S. Rep. 1035, 75th Cong., at 2 (1937) (noting that the Tax Injunction Act was intended to protect States from well-financed litigants who could "seriously disrupt State and county finances" by withholding tax payments during the course of federal-court litigation). This Court, too, has long recognized that the fundamental attribute of state sovereignty is the authority to administer and enforce state taxes. As it explained in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), the Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 450 U.S. at 522.

This Court has also held that federalism acknowledges "the imperative need of a State to administer its own fiscal operations," (*Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)), and has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state

tax administration," (*Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995)). *See also Colville*, 447 U.S. 134, 157 (1980) ("[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services"); *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) ("[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible").

It is no longer open to debate that a State's authority to administer and enforce its tax laws implicates significant sovereign interests. Without the ability to collect taxes to fund state services for "internal order, improvement, and prosperity of the State," any notion of sovereignty is an illusion. Indeed, while it may be possible to imagine a state government continuing to maintain its sovereignty despite the lack of owning any land, *cf. Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997), it is impossible to imagine that a state government could continue to exist without the power to tax.

Finally, a State's construction and maintenance of its system of roads and bridges can hardly be characterized as anything but providing for "internal order, improvement and prosperity of the State." An extensive, well-maintained road and bridge system is vital to the State's economy. The State's children use the state road and bridge system to get to and from school to receive their education. Law enforcement and emergency fire and rescue personnel use the state road and bridge system to

provide law enforcement and safety services to all of the State's citizens, including tribal members. These are but two examples of the significant interests the State has in its highway infrastructure. It cannot be doubted that a robust road and bridge system, built, maintained and paid for by the State, touches upon and provides benefits for all of the State's citizenry. Kansas funds its road, highway and bridge construction and maintenance principally from its fuel taxes imposed on the receipt of fuel by the distributor, importer and manufacturer. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). In this case, the taxable event – receipt of the fuel by the distributor – occurred off-reservation. J. A. 114, 119.

B. Tribal Interests

This Court has recognized that Indian tribes enjoy the right to "make their own laws and be ruled by them" and that such right is protected by federal law from improper state infringement. *Williams v. Lee*, 358 U.S. 217, 220 (1959). So, for example, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906); the power to make substantive law in internal matters, *Roff v. Burney*, 168 U.S. 218, 222-23 (1897); the power to adjudicate child custody disputes among tribal members, *Fisher v. District Court*, 424 U.S. 382, 389 (1976); the power to prescribe rules for the inheritance of property, *United States v. Quiver*, 241 U.S. 602, 604 (1916); *Jones v. Meehan*, 175 U.S. 1, 29 (1899); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 102 (1856); and the power to regulate economic activity on its own lands,

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).[1]

The Court nonetheless has also recognized that "there is a significant territorial component to tribal power" and that it has no extraterritorial reach. *Id.* at 142. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001) (finding *Merrion* inapposite where tribe attempted to tax transactions by nonmembers that took place on non-tribal fee land within reservation). Equally important, a tribe's self-governance power does not extend as a usual matter to nonmembers and hence cannot affect the latter's obligation to comply with state law. *Cf. Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (tribe lacked adjudicatory authority over personal injury claim arising from on-reservation accident occurring on state highway between two nonmembers).

C. Balancing Off-Reservation State Authority Is Improper

Given the narrow scope of tribal self-governance principles generally and, in particular, with regard to non-tribal members, this Court articulated in *White Mountain Apache* an interest balancing test, which is grounded in *positive* federal-law preemption, to assess the permissible reach of state law with respect to on-reservation activities of non-members engaged in an economic relationship with a tribe. 448 U.S. at 144 ("When on-reservation conduct

[1] The Court has, however, also made clear that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. . . . More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . ") (citation omitted).

Subsequent decisions applying *White Mountain Apache* have employed the special Indian preemption standards only to resolve issues of on-reservation application of state law. *E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 203 (1987) (tribal bingo operations on-reservation, balance favors tribe); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1984) (application of state law to on-reservation hunting and fishing by non-Indians); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 836 (1982) (construction of an on-reservation tribal school, balance favors tribe). Even in the course of such application, this Court has noted the geographical limit on the interest balancing test. *Mescalero Apache*, 462 U.S. at 335 n.18. Here, of course, Respondent has never alleged, and no court has found, that Kansas has attempted in any manner to exercise jurisdiction over any on-reservation tribal activity. Since *White Mountain Apache*, the central theme in this Court's decisions regarding balancing is manifest: balancing is only proper when conflicts between tribal and state interests occur concerning on-reservation activity.

It is unsurprising, therefore, that this Court has formulated a far different rule where off-reservation activity may affect tribes or their members. When the question has involved a State's exercise of off-reservation jurisdiction, there has been one constant in this Court's

precedent: traditional preemption standards – not special Indian law preemption standards – apply. Simply put, there cannot be any conflict off-reservation between State and tribal interests to be balanced, because this Court has determined that a tribe's reservation border acts as a barrier to the reach of a tribe's interests.

In such situations, a "categorical" rule consonant with the ordinary presence of state power in the absence of congressional interdiction governs. As the Court explained seven years prior to *White Mountain Apache*, "tribal activities conducted outside the reservation present different considerations" and that, in such instances, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries generally have been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). *See also DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (tribal jurisdiction limited to Indians and Indian land, and State retains jurisdiction over non-Indians and land which is not Indian Country). The inherent sovereignty of Indian tribes, however, extends only "over . . . their members and their territory" because their dependent status generally precludes extension of tribal civil authority beyond these limits. *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Chickasaw Nation*, 515 U.S. 450, 464 (1995) (tribe's argument that "Indians and Indian tribes are generally immune from state taxation" held not persuasive because "this principle does not apply outside Indian country.").

The modern decisions embodied in cases such as *Mescalero Apache, Chickasaw Nation* and *Atkinson* reinforce the rule that an Indian tribe's dependent status generally precludes extension of tribal interests beyond its

reservation borders. This rule effectively equates with traditional preemption standards – and not the special Indian law preemption standard. *E.g.*, *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). The reservation border thus serves as the line of demarcation in determining which standard to apply.

Given *White Mountain Apache*'s express recognition that, absent express federal preemption, a state is free to apply its non-discriminatory, off-reservation laws (even against Indians), States have relied on the proposition that they are free to apply their non-discriminatory, off-reservation laws without reference to *ad hoc* balancing tests. The court of appeals' decision, in short, significantly and wrongly alters the legal landscape created by *White Mountain Apache* and *Mescalero*. Under the decision below, not only is a State's ability to regulate tribes and their members off-reservation through non-discriminatory laws (including tax statutes) in doubt, but now a State also cannot reasonably even be assured of regulating non-tribal members, even off-reservation, if the regulation might, in some manner, subsequently affect a tribe's on-reservation interests.[2]

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[2] The recent decision in *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005), reflects this skewed view of *White Mountain Apache*'s applicability. The issue there was whether Kansas may administer its motor vehicle licensing and titling laws to vehicles that have been titled on-reservation by the tribe when those vehicles are driven off-reservation. In finding state law preempted, the panel majority applied the *White Mountain Apache* balancing test because "even though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons, 'we deem it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'" *Id.* at 1022. The court thus effectively gave extraterritorial effect to the

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Although the patent conflict between the court of appeals' decision and *Mescalero Apache* constitutes ample basis for reversal, other decisions of this Court support, if not dictate, the same result. First, in *Chickasaw Nation*, 515 U.S. 450 (1995), the Court applied the "well-established principle of interstate and international taxation – namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction" – in sustaining the validity of Oklahoma's income tax with respect to earnings from tribal employment within Indian country of tribal members who resided outside Indian country. *Id.* at 462-63. The tribe's response to that "well-established principle" was a provision in the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-34 (applicable to the Chickasaw Nation January 17, 1837, Art. I, 11 Stat. 573), under which no Territory or State was to "have a right to pass laws for the government of the Nation of Red People and their descendants." 515 U.S. at 465. The Court rejected the tribe's argument, finding the treaty privilege restricted to Indian country and not fairly susceptible to being read "as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits." *Id.* at 466. Here, in contrast, Respondent neither does nor can point to some "express" provision of federal law that precludes Kansas from imposing its motor fuel tax on the off-reservation receipt of

tribal regulation because of the perceived adverse impact on that regulation by state non-recognition. *See id.* at 1024 ("[i]f Defendants continue to enforce State motor vehicle registration and titling laws to the exclusion of tribal motor vehicle registration and titling, the Tribe's 'motor vehicle code will be effectively defunct' ").

fuel by a nonmember or, for that matter, a member. The absence of such a claim is dispositive in light of Chickasaw Nation.[3]

That off-reservation regulation may have a direct or indirect on-reservation economic effect – which is at the heart of the rationale offered by the court of appeals for its ruling – makes no difference. In *Chickasaw Nation*, for example, one may assume that requiring a tribal employee to pay state income tax may have affected the compensation level necessary for the tribe to attract and maintain its work force. Perhaps more telling on this point is *Nevada v. Hicks*, 533 U.S. 353 (2001). There, the Court found constitutionally unembarrassed the on-reservation execution of a state court-issued search warrant against a tribal member in connection with an off-reservation violation of state game law. It observed, citing *Mescalero Apache* as authority, that "[i]t is . . . well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation." *Id.* at 362. The Court then held that such "authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes" (*id.* at 363) because "tribal authority to regulate state officers in executing process related to

[3] The *Chickasaw* Court did not address the question whether the Oklahoma income tax infringed impermissibly on tribal self-governance rights. 515 U.S. at 464-65. That issue similarly is not presented here, both because it has never been raised and because internal self-governance is not implicated by virtue of off-reservation state taxation of a nonmember. *See, e.g, Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989) (upholding state oil and gas severance tax imposed upon corporation with respect to reservation production also subject to tribal taxation).

the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them[]'" (*id.* at 364).

Hicks, of course, presented a significantly different factual situation, since no on-reservation regulation by Kansas is at play instantly. It nevertheless negates any suggestion that the *Mescalero Apache* standard is altered by virtue of subsequent, collateral on-reservation effects. As in *Hicks*, any *on-reservation* state conduct attendant to those effects conceivably may raise a preemption issue controlled by special Indian law principles, but the existence of state regulatory authority over the predicate off-reservation conduct remains intact.

Last, the pernicious effect of the court of appeals' reasoning on the States' administration of their tax laws must be emphasized. If the decision below is not reversed, before exercising tax jurisdiction with respect to an off-reservation transaction, States must now try to ascertain whether exercise of that authority might have an indirect economic effect on a tribe's proprietary interests. Such an approach has been expressly eschewed by this Court. *Chickasaw Nation*, 515 U.S. at 460 ("[i]f we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product."). Equally telling is the fact that the court of appeals' reasoning will create an incentive for tribes to assert all manner of claims alleging that off-reservation state taxation, or other civil regulation, has an adverse on-reservation impact which requires preemption analysis under what has proved to date to be the highly subjective interest-balancing standard.

Given the repeated decisions from this Court that tribal interests cannot extend beyond reservation boundaries, coupled with the equally numerous decisions from this Court holding that states are free to apply their non-discriminatory laws off-reservation, even against Indians, the court of appeals' decision here is simply indefensible. Off-reservation regulation by a State is subject instead only to ordinary federal preemption standards, *i.e.* state sovereign power may be preempted only by an express act of Congress exercising a valid constitutional authority or when Congress has so occupied a given field in the exercise of its valid constitutional powers that there is no room for State jurisdiction.

II. BECAUSE *WHITE MOUNTAIN APACHE* INTEREST BALANCING FAILS TO PROMOTE EVENHANDED, PREDICTABLE AND CONSISTENT DEVELOPMENT OF LEGAL PRINCIPLES, IT SHOULD BE REPLACED WITH A PREEMPTION ANALYSIS BASED ON CONGRESSIONAL INTENT.

In order to finance their governments, provide services and properly administer programs for their citizens, States need clarity as to jurisdictional limitations, certainty concerning rules of application, and consistency of results. Unfortunately, the *White Mountain Apache* balance-of-interests test is seriously deficient on all counts. It thus has become abundantly clear that the interest-balancing test laid down almost 25 years ago has proved unworkable. Then-Justice Rehnquist's dissent in *Colville*, 447 U.S. at 176-88, is prescient in this regard. *White Mountain Apache* has produced protracted litigation in which neither side can, nor will, acknowledge that the

balance-of-interests favors the other. This flight to litigation is encouraged by the interests balancing test itself, which has devolved into a case-by-case, highly subjective exercise generating unpredictable outcomes.

When governing decisions are unworkable this Court has never felt constrained to follow precedent. *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (*Payne v. Tennessee*, 501 U.S. 808, 828 (1991) quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). *Stare decisis* is not an inexorable command in the area of constitutional law) *Payne* at 828. It is the preferred course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827. Kansas submits that the *White Mountain Apache* interest-balancing test fails to achieve any of those salutary purposes in the taxation context where, more than any other area of civil regulation, concrete and reasonably *per se* rules are essential.

States cannot administer their statutes effectively when one party can alter circumstances or create novel theories that ostensibly "shift" the balance against the state tax. They need a clear, bright-line test, as this Court held in *Chickasaw Nation*, 515 U.S. at 460. Balancing does not provide it. The appropriate approach is instead to follow a straightforward preemption standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax ultimately may be borne by the Government. *See*

Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37-38 (1999).[4]

When it has served the greater good, this Court has never shied away from using bright-line tests and, in fact, endorses their use when they promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court reasoned:

> [W]e have never intimated a desire to reject all established 'bright-line' tests. . . . Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority . . . . This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

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[4] As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the economic burden of the tax through to a person who is exempt from tax. *See United States v. Detroit*, 355 U.S. 466, 469 (1958); *cf. Colville*, 447 U.S. at 151 ("[t]he State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.").

Id. at 314-16. The rationale for using a bright-line test to limit state jurisdiction in certain circumstances applies equally to preserve and protect state jurisdiction. Adopting traditional preemption standards in lieu of the *White Mountain Apache* balancing architecture will further the important interests animating *Quill*'s holding and comport with this Court's historical philosophy of providing ascertainable, workable parameters for state tax administration.

The efficacy of a bright-line approach here is reflected in a paradigm of the layered complexity attendant to the *White Mountain Apache* test, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

> In our case the following facts favor preemption:
>
> 1. The fee is held by the United States in trust for the Tribe.
>
> 2. The Tribe has furnished the site for the Hotel.
>
> 3. The Tribe has ownership of the Hotel, its facilities, and all improvements.
>
> 4. The Tribe has a residual interest in the assignment of the lease.
>
> 5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

> 6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.
>
> 7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.
>
> 8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

> 1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The manager of the Hotel was not aware of any employee from the Tribe.
>
> 2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.
>
> 3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.
>
> 4. The Tribe receives only a guaranteed 1-1/4 percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."
>
> 5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

(a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.

(b) The law . . . . and other security instruments such as the mortgages by which the Hotel is financed.

(c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, not unlike the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's "active role in *generating activities of value* on its reservation[;]" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services 'critical' to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting). It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and tax administrators with no real guidance when attempting to conform their actions to applicable federal law.

As is evident from *Yavapai-Prescott*, the *White Mountain Apache* standard not only engenders litigation of tremendous factual complexity but also compounds that complexity with largely uncontrolled judicial discretion in

identifying and weighing those facts deemed most significant.[5] This potent combination plainly leads to unpredictable judicial decision-making. Consequently, such a case-by-case approach ultimately serves to encourage development of new legal or factual theories by those aggrieved by state-law exactions and more litigation – a result antithetical to the States' interest in a stable and efficient tax system.

In this case, the district court correctly determined – and the court of appeals did not dispute – that the State's exercise of jurisdiction through the legal incidence of the Kansas tax at issue falls on non-Indian distributors on transactions occurring off-reservation, rather than on Respondent. J. A. 119. Indeed, no other conclusion seems possible here, given that the tax is not imposed on any activity occurring on tribal lands and Respondent is not required to collect or remit the tax to the State. The court of appeals, while ignoring the fundamental differences from the case at bar, cites *Colville*, *Cabazon Band*, and *Chickasaw Nation* to support its conclusion that the balance-of-interests test strikes the State tax imposed off-reservation.

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[5] The decision below illustrates graphically the potential complexity. The court of appeals relied heavily on a "reservation value added" theory – *i.e.* the proposition that most fuel purchasers were drawn to the reservation by the casino and not simply a price differential attributable to a lower tribal tax – to invalidate the Kansas tax. The elastic nature of that notion hardly needs detailed elaboration. Under the court of appeals' approach, States likely will be required either to adduce or rebut evidence related to, *inter alia*, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each separate permutation's "uniqueness" effectively vitiate any notion of predictability for tax administration purposes.

Each of those cases involve either (1) state regulation of activity occurring on tribal land; or (2) a requirement that tribes collect and remit taxes to the State from transactions arising on-reservation; or (3) both. In this case, by contrast, the only connection between the Kansas tax and Respondent is that some distributors sell motor fuel to Respondent and may charge a cost that passes through the tax's economic burden. The State is not attempting to regulate any activity on tribal lands, is not attempting to exercise jurisdiction over Respondent or its members, and is not requiring Respondent to collect and remit taxes to the State.

The court of appeals rested its decision largely on the notion that the transient economic burden of an off-reservation state tax harmed Respondent's economic viability (*i.e.* its profits), and was sufficient to preempt the off-reservation state tax. The court of appeals' conclusion was created out of whole cloth via the balance-of-interests test. It is the only way that the state tax here could be preempted, because there was no controlling authority to support any other method of preemption.

To further support its decision that the federal interests weigh in on the side of the Respondent, the court of appeals cited to various federal statutes, a Presidential Proclamation, and an Executive Order as reflecting a generalized federal interest in tribal economic development and self-sufficiency.[6] Inasmuch as these statutes,

[6] *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 986 (10th Cir. 2004) ("These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001);

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proclamations and orders are wholly unrelated to a State's administration of its laws off-reservation, and none addresses, even remotely, motor fuel sales and distribution, the court of appeals' reliance on them is misplaced.[7] Further, while Kansas does not dispute that the federal government has a generalized interest in tribal economic development and self-sufficiency, it does posit that the federal government has a compelling interest in avoiding interference with state taxation policy outside Indian country.

The court of appeals' rationale clears the way for a host of tribal challenges to state taxes that are not imposed on tribes but that may indirectly affect tribes and non-Indians who do business with tribes. For instance, an increase in gasoline distributors' state property, sales or income taxes generally results in an increase in the price

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed.Reg. 57641 (Nov. 15, 2001) ('We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.'); Presidential Executive Order 13175, 65 Fed.Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ('[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.')").

[7] *See Colville*, 447 U.S. at 155 ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.")

that distributors charge their customers for gasoline. Because this may cause tribal retailers to pay higher prices for their gasoline, the court of appeals' reasoning allows tribes to challenge any state tax that their supplier has to remit to the State.

Two simple examples cited by the court of appeals as supporting preemption actually serve to illustrate inherent flaws of balancing: First, The court of appeals found that Respondent's fuel price is within two cents of market. J. A. 40, 139-40. But what if it was four cents, six cents, eight cents, a dime below market? At what amount does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? What is the market? Is it the reservation, the county in which the reservation is situated, the State? Second, Respondent's fuel station was adjacent to its casino. J. A. 133. What if Respondent's fuel station was a quarter of a mile from its casino, a half-mile, one mile, two? How close does it have to be? When is it far enough away that it no longer "draws value" from a tribal casino? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? Is a state tax preempted if the gas station is adjacent to a tribal businesses other than a casino? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

Further, the balance-of-interests test leaves business taxpayers in limbo. The balance-of-interests test provides them no voice or discernable predictability, yet they are expected to write the check. How is a business supposed to know which way the balance will "tip" at the time they purchase property or services that may subsequently end

up on a reservation? How are they to discern which facts among the legion available will be determinative? Do they simply wait until years of litigation culminate in a decision? Do they remit the tax and risk offending future customers, or do they take the risk of running afoul of state law by not remitting the tax? How can business taxpayers know how and to what extent to make business plans when the "balance" can be changed from time to time depending on creative legal theories or ever-shifting factual scenarios?

Placing the States and taxpayers in such a conundrum hardly provides for the evenhanded, predictable, and consistent development of legal principles, and does not foster reliance on judicial decisions, nor contribute to the actual and perceived integrity of the judicial process.

Finally, the difficulty for state tax administrators resulting from the *ad hoc* litigation model can be seen by contrasting this case with *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir. 2000). The court of appeals in *Sac and Fox* determined that unless the plaintiff tribes there could prove that they sold a substantial portion of their fuel to tribal members, distributors in Kansas were required to remit fuel taxes on fuel delivered to tribal gas stations owned by the tribes, despite the fact that those gas stations were located near other tribally owned businesses. *Id.* at 583. Now, however, the same court has said that because a gas station adjoins Respondent's tribally owned business, tribal interests can reach across reservation boundaries under the rubric of "reservation value added" and invalidate the same tax imposed off-reservation on the same distributor. The courthouse door thus remains always open for tribes to continue to alter facts, to create novel theories and to re-litigate until they hit upon a mixture of factors that, in a particular court's eyes, merits striking

down state tax in question. The specter of continuing litigation of this sort counsels abandonment of the *White Mountain Apache* balance-of-interests test.

This Court should, therefore, replace the *White Mountain Apache* balance-of-interests test with the straightforward, traditional federal preemption standard based on the preemption standards recognized in *United States v. New Mexico*. Such an approach provides clear guidance, precise lines of demarcation, and largely predictable results for States, business taxpayers and tribes. The Court thus observed in *Blaze Construction*, where it declined to extend *White Mountain Apache* to resolve a preemption challenge to a state tax imposed on a Bureau of Indian Affairs road-construction contractor, that "[i]nterest balancing in this setting would only cloud the clear rule established by our decision in *New Mexico*." 526 U.S. at 37. There is, in this regard, no substantial justification for imposing a less stringent preemption standard with respect to Indian tribes or their members than for the Federal Government. *See Ramah Navajo*, 458 U.S. at 847 (Rehnquist, J., dissenting) (criticizing application of *White Mountain Apache* rather than *New Mexico* standards, since holding "accord[ed] a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here.").

Adoption of *New Mexico* principles will recognize the States' compelling interest in a readily-ascertainable sphere of taxing authority and the inappropriateness of rebalancing arguably competing interests from case to case. This approach will also be consistent with both the "categorical" rule (*Chickasaw Nation*, 515 U.S. at 450) adopted by the Court against direct state taxation of tribes and

their members with respect to reservation property and transactions absent congressional authorization and the similarly *per se* rule permitting state taxation of nonmember on-reservation property or activities that are not related to a commercial or other relationship with the resident tribe (*County of Yakima v. Confederated Tribes and Bands of Yakama Nation*, 502 U.S. 251, 257-58 (1992)).

III. CONTRARY TO CONTROLLING PRECEDENT FROM THIS COURT, THE COURT OF APPEALS' DECISION WRONGLY PLACED RESPONDENT'S ECONOMIC INTEREST IN A POSITION SUPERIOR TO THE STATE'S STRONG, FUNDAMENTAL INTEREST IN ITS SYSTEM OF OFF-RESERVATION TAXATION.

Assuming *arguendo* that the court of appeals was correct in balancing the State's off-reservation interests in administering its system of taxation, it misapplied the *White Mountain Apache* test by, most importantly, misconstruing the reservation-generated value element discussed in *Colville*. The court reasoned that because Respondent's gas station sits near the tribal casino, casino patrons are drawn to the gas station by the casino and that, therefore, such proximity creates "value generated on the reservation" sufficient to trump the state tax imposed on off-reservation transactions.

This Court addressed the justification denominated by the court of appeals as "value generated" over a century ago in *Thomas v. Gay*, 169 U.S. 264 (1898). There, it was argued that the Organic Act of Oklahoma precluded territorial taxation of cattle grazing on Indian reservation land as impairing "any right now pertaining to any Indians." It was claimed that Indians were directly and vitally

interested in the property sought to be taxed; that the Indians' rights and rights of property would be seriously impaired by the territorial tax; that the money received by the tribe from the grazing leases were to be used by the tribe for tribal uses and tribal government services; that the federal government's interest in tribal issues precluded territorial taxation; and that if the territorial taxes were allowed to be imposed it would devalue the reservation lands, the tribe would not get as much profit, and its leases and revenue flow would fluctuate or be completely destroyed. *Id.* at 271-73. The *Thomas* Court nonetheless swept aside all of the above arguments against the territorial tax, holding that a tax upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. *Id.* at 273. The Court likewise held that the character of the territorial tax in no way impeded Congress' plenary power over the Indians. *Id.* at 274-75. Slightly less than a decade later, the analysis and conclusion in *Thomas* were followed in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906).

The circumstances here present an equally, if not more, compelling basis for the same conclusion. In *Thomas*, the cattle sought to be taxed by the territory were actually on the tribe's reservation consuming, literally, resources especially connected to the tribe's land (*i.e.* grass). Here, there is no evidence that the motor fuel is a natural resource especially connected to Respondent's land.

The receipt of fuel here is taxed by the State *off*-reservation. Kansas is *not* attempting to tax Respondent's sales on the reservation or the resulting profits. In *Thomas*, no reservation "value" (*i.e.* the land or the rents paid to the tribe) were sought to be taxed by the Territory even

though the underlying transaction did take place on reservation. The tribe, in other words, had no property right or expectation in the commodity sought to be taxed by the Territory. Similarly, Respondent has no property right in the fuel at the time the State levies its tax. Finally, in *Thomas* the fact that the tribe might lose revenues was found irrelevant because the territorial tax was too remote to infringe on the tribe's rights and property. The same is true in this matter.

Nearly a century later, the underlying rationale of *Thomas* was confirmed, and similar arguments raised by a tribe were rejected, by this Court in *Colville*. 447 U.S. at 154-59. In dispute there was the State of Washington's imposition of a cigarette sales tax on *on*-reservation purchases by tribal nonmembers of the tribes. The Court phrased the issue as whether an Indian tribe ousts a State from any power to tax *on*-reservation purchases by nonmembers by levying its own tax on the transactions or by otherwise earning revenues from the tribal business. *Id.* at 154. The court of appeals below distinguished *Colville* on two grounds: First, in contrast to the smokeshops, Respondent is not marketing an exemption from state taxes, J.A. 139; and, second, Respondent is not merely importing a product for resale to non-Indians, J.A. 140. Neither of these distinctions withstands even casual scrutiny.

As to the first distinction, limiting the inquiry to whether Respondent is "marketing an exemption," is a slippery slope that no court has ventured to traverse. *See, e.g., Chemehuevi Indian Tribe v. California State Bd. of Equal.*, 800 F.2d 1446, 1450 (9th Cir. 1986) ("[w]ere we to accede to the tribe's arguments and distinguish *Colville* on the grounds that in *Colville*, non-Indian purchasers were attracted to the reservation solely to purchase tax-free

cigarettes, we would raise the specter of drawing distinctions on a case-by-case basis, relying on such factors to allow or disallow state taxation as whether non-Indian customers resided on or off reservation, the existence of other tribal amenities attracting visitors to the reservation, the length of time visitors spent on the reservation, the level of state funding of reservation, and the amount of tribal effort devoted to marketing the product."). The fact that a tribe attempts to entice individuals to do business on reservation through a tax differential constitutes only one factor that bears upon the preemption challenge's outcome. *See Colville*, 447 U.S. at 155 ("The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas.").

The second purported distinction cannot be squared with the facts in the record. As previously discussed, the "value" the court of appeals attributed to the fuel was the fact that it was dispensed near the Respondent's casino. Nothing in the record suggests, much less establishes, that Respondent creates, manufactures, enhances or alters in any manner the fuel itself. There is nothing in the record that Respondent's gasoline sales are in any way especially connected with its land, or the regulation or harvesting of any natural resource on that land. Indeed, the district court specifically *found* that Respondent simply imports the finished fuel product and offers it for sale to ultimate users. J.A. 91, 114. Equally important, *Colville* did not hold that the existence of reservation generated value automatically

warrants preemption. This Court instead identified such value, deemed the "strongest" consideration in support of preemption, at the same time that it identified the "strongest" ground for upholding the state tax as the provision of governmental services. 447 U.S. 156-57 (on one hand, "[w]hile the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services[;]" on the other hand, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services."). *Colville* did not address the question whether, when these interests stand in counterpoise, one or the other prevails. That question, however, was answered definitively almost two decades later in *Cotton Petroleum* – a decision unmentioned by the court of appeals notwithstanding its "pathmarking" status. (*Montana v. Crow Tribe*, 523 U.S. 696, 715 (1998)).

In *Cotton Petroleum*, this Court removed any doubt that the mere presence of reservation generated value is sufficient to preempt a state tax whose legal incidence is borne by a nonmember. The presence of such value was undisputed there, since the involved state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases,

the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What *was* dispositive was the fact that New Mexico provided "'substantial services'" to the tribe and the mineral lessee. *Id.* at 185. These same principles have been applied subsequently where an excise or other type of state taxation is in question. *E.g.*, *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (stamped cigarette allocation scheme); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (transaction privilege tax). The decision below applying *White Mountain Apache* cannot be reconciled with *Cotton Petroleum* for obvious reasons.

The court of appeals gave no weight to the fact that the state taxpayer, the distributor, and Respondent's patrons are afforded many state benefits, chief of which is four-lane State Highway 75 to get to Respondent's casino and gas station.[8] That state highway is paid for with state fuel taxes. Kan. Stat. Ann. § 79-3402 (1997). The significance of this fact was noted by the district court. J. A. 114-15, 118. Moreover, a prior panel determined that customers of tribally operated gas stations largely use state highways and services paid for by state fuel taxes. *Sac and Fox Nation*, 213 F. 3d at 585 and n.15. In striking contrast, the court of appeals here placed dispositive weight on the one-and-a-half-mile access road built by Respondent from

[8] While it is the largest roadway on and near Respondent's reservation, State Highway 75 is only one of many state and local roads paid for by state motor fuel taxes on and near the reservation that its patrons use in traveling to and from the casino.

State Highway 75 to its casino and gas station and the fact that Respondent's gas station would have few customers if not for the casino. The appellate panel gave no discernable weight to the state services without which the access road would lead nowhere and would have no traffic to justify its very existence. How many casino patrons would be "drawn" to Respondent's gas station or casino if they had to walk from Topeka or Wichita or other points in Kansas to the access road, instead of using a modern, four lane, state-of-the-art state built and maintained highway?

The court of appeals thus ignored not only the overall highway infrastructure, both on and off reservation, essential for the access road or the casino itself to have "value" but also the fact that, under *Cotton Petroleum*, the provision of such infrastructure and the dedication of the motor fuel tax to its upkeep more than amply justified Kansas' right to tax the distributor.

Beyond its failure to recognize the significance of *Cotton Petroleum* and the dispositive nature of the services provided the distributor specifically and the tribal facilities' patrons generally, the court of appeals failed to appreciate, or at least to analyze, that the distributor here is the state taxpayer and that the ultimate consumer – *i.e.* the gas station patron – is the tribal taxpayer. This case accordingly presents a situation where taxes are imposed by two different sovereigns at two different points in time in two different locations, one off – and the other on – reservation, with respect to two different transactions that involve two different sets of taxpayers. The only common feature of the taxes is that their amount is determined, in part, by the volume of gas received (by the distributor) or purchased (by the tribal station's patrons). The state and tribal taxes thus cannot be characterized as "concentric" or

"concurrent." The state tax is, at the end of the day, merely another element of the price of doing business for motor fuel retailers. Respondent ought to stand in no favored position in comparison to other retailers who do business with the distributor merely by virtue of its tribal status.

* * *

Taxation is a core sovereign interest of every State. The real effect of the court of appeals' decision here is to preclude the collection of a validly enacted state tax – not even imposed on Respondent and not even requiring its assistance in collecting it – thereby depriving Kansas of substantial tax revenue that it would otherwise collect. This Nation's system of federalism does not support such a conclusion, and the court of appeals erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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